LIBRARY
SUPREME COURT, U. S.

FILED
JUN 27 1967
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966.

No. 200

BLUE CAB COMPANY AND VILLAGE CAB COMPANY,
Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

BRIEF FOR RESPONDENT LOCAL 782, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA IN OPPOSITION.

SHELDON M. CHARONE,
SHERMAN CARMELL,
Attorneys for Respondent Local 782, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

CARMELL & CHARONE,
29 South LaSalle Street,
Chicago, Illinois.

THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO 56

INDEX.

	PAGE
Argument	5
Appendix A, 29 U. S. C. § 160(e)	11
Conclusion	9
Jurisdiction	2
Opinions Below	1
Questions Presented	2
Statement	3
Statute Involved	2

List of Authorities Cited.

National Labor Relations Board v. Light Boat Storage, Inc., 64 L. R. R. M. 2457 (1967) 5, 6

NLRB v. Katz, 369 U. S. 736, 747 (1962) 8

NLRB v. Seven-Up Bottling Co., 344 U. S. 345, 350 (1952) 7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966.

No. .....

BLUE CAB COMPANY AND VILLAGE CAB COMPANY,
Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

BRIEF FOR RESPONDENT LOCAL 782, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA IN OPPOSITION.

OPINIONS BELOW.

The opinion of the court of appeals is not yet officially reported, but is printed in Appendix A of the Petition. The Board's decision and order (J. A. 284-329) is reported at 156 N. L. R. B. 489.

JURISDICTION.

Petitioner adequately describes the jurisdictional requisites.

QUESTIONS PRESENTED.

The questions presented by petitioners do not fully and sufficiently describe the issues. The questions more adequately formed would be:

Whether the National Labor Relations Board has the power to require a party who has not complied with the notice requirements of Section 8(d)(3) of the Act to continue to give effect to the contract until such requirements have been satisfied.

Whether it is a refusal to bargain collectively, in violation of Section 8(a)(5) of the National Labor Relations Act, for an employer to unilaterally change the meter rate when the compensation of its employees is based primarily upon a percentage of such rate.

Whether the court of appeals correctly applied the "substantial evidence" test in affirming the Board's finding that employees who were discharged were entitled to reinstatement and back pay.

STATUTE INVOLVED.

Except for Section 160(e) which is set forth in Appendix A, infra, p. 11, the other relevant statutory provisions are set forth in the Petition.

STATEMENT.

Petitioners' statement generally sets forth the relevant facts. Respondent Local 782, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America intervened in Case No. 20,148, in which the court enforced the Board's order in its entirety.

It should be emphasized that the overall activities of petitioners evidenced a comprehensive plan to destroy the union's majority status (J. A. 326).

The Board found that petitioners violated Section 8(a)(1) of the Act by:

(1) promising the employees benefits such as greater compensation as driver-lessees and continued hospital insurance if they would discontinue their union adherance;

(2) threatening to close the business before they would sign another union contract;

(3) expressing an intention to get rid of the union and threatening employees with discharge or other reprisals if they continued their union adherance; and

(4) offering economic benefits to those on the picket line and soliciting their return to work (J. A. 315, 325).

The *in toto* violation of Section 8(a)(5) found by the Board included:

(1) unilaterally changing the existing wage structure of its drivers;

(2) bargaining directly with the employees with regard to the proposed driver-lessee agreements;

(3) refusing to negotiate and discuss with the union the driver-lessee arrangements and other terms and conditions of employment; and

(4) refusing to bargain in good faith within the meaning of Section 8(d) and 8(a)(5) (J. A. 315, 325).

Finally the Board held that petitioners violated Section 8(a)(3) by "clearly demonstrating that [their] action had as its specific intent the permanent severence of the employment relationship with the elimination of the union as the bargaining representative and the discouragement of union membership" (J. A. 326).

Based on the above finding the Board issued its traditional order to remedy the massive unfair labor practices which were committed by petitioners.

ARGUMENT.

This Court is asked to review a refusal to bargain order of the Board which was enforced by the Court of Appeals for the District of Columbia in a unanimous decision. The case involved a routine attempt to destroy the union's majority accompanied by threats, discharge of the employees when the threats became ineffective and termination of the contract without complying with the notice requirements of Section 8(d). The case is not novel and represents only a routine application of well settled Board principles. Petitioners' reasons for granting the Writ will be discussed below.

1) There is no conflict in the circuits.

Petitioners contend that the decision of the Fifth Circuit Court of Appeals in *National Labor Relations Board* v. *Light Boat Storage, Inc.*, 64 L. R. R. M. 2457 (1967) (not yet officially reported) in which the Board's order in 153 NLRB 1209 (1965) was modified is "in direct conflict with the Board's order in the instant case."

In *Blue and Village Cab,* the General Counsel charged in his complaint that petitioners had violated Section 8(a)(5) by failing to notify Federal Mediation and Conciliation Service and the appropriate State agency of the existence of a dispute. The Board in agreement found that petitioners had not served notices (J. A. 304, 30, 242-244) and ordered them to reinstate and operate under their contract in effect on June 30, 1963, until such time as that contract may lawfully be terminated by giving the appropriate notice to Federal Mediation and to the appropriate State agency as required by Section 8(d)(3) of the Act (J. A. 327-328).

The Board's decision in *Light Boat* was not predicated upon a violation of Section 8(d)(3). The Board never considered the requirements of Section 8(d)(3) and specifically overruled the trial examiner's reference to 8(d) with the comment: "In agreeing that the Respondent violated Section 8(a)(1) and (5) of the Act as alleged, we find it unnecessary to consider or pass upon the trial Examiner's dictum as to the requirement of mid-term notice under Section 8(d)." 153 NLRB 1209.

Petitioners' statement that "the facts on this point in the instant case are almost identical to those in the *Light* Boat Storage Case" is of no significance. What is significant is that the issue of an 8(d) violation was neither charged, litigated nor decided by the Board in *Light Boat*. The rationale of the Fifth Circuit in *Light Boat* is similarly of no help to petitioners. The basis for the Fifth Circuit's decision was its conclusion that "the Board is not competent to interpret contractual provisions or adjudicate contractual disputes". Amplifying its reasoning, the court stated:

> "The Board may order an employer to sign an agreement or even to 'honor' a contract. This distinction explains the *Hyde* distinction that the Board may order the company 'to honor' but may not order the company to comply with the contract; In the *Hyde* sense 'compliance' means the act of carrying out the various provisions of the contract and would require the Board to determine when performance was satisfactory. 'Honor' means the respect due to a contract by a party to the contract, leaving disputes over the meaning of the contract's terms to a court or an arbitrator."

Thus the Fifth Circuit's refusal to enforce the Board's order was solely on the basis that the Board was not competent to interpret contractual language. In sharp distinction, the order under review is predicated only upon the

failure to comply with Section 8(d). The District of Columbia Circuit has not "plunged into the thicket of contract interpretation" which worried the Fifth Circuit. Requiring compliance with the notice-requirement of Section 8(d) does not involve contract interpretation but a mere determination of whether the parties have complied with the statutory requirements. Failure to give 8(d) notice is a violation of the Act which the Board, not arbitrators, has the duty to cure.

We submit, that the decision in *Light Boat* is inapposite.

2) Since petitioners did not urge before the Board its contention that reduction of meter rates is a pricing decision outside of the scope of collective bargaining, it is precluded by § 160(c) from raising that issue before this Court.

In its exception No. 13(b), respondents excepted to the trial examiners finding that they violated Section 8(a)(5) by reducing meter rates: "The reduction in meter rates (T. E., p. 15, lines 13-20) was not made by the respondents until the union began picketing on July 1, 1963, which was after the expiration of the contract".

We submit that the pricing aspect of the problem is not now properly before the Court.

> "The company never made before the Board the objection it now bases on the seasonal nature of the business. Section 10(e) of the Act, 61 Stat. 136, 147, 148, 29 USC (Supp. IV) § 160(c) provides: 'No objection that has not been urged before the Board, its members or agents, or agency, shall be considered by the court, unless the failure or neglect to urge such contention shall be excused because of extraordinary circumstances . . . No extraordinary circumstances are present such as would justify permitting the issue to be raised here for the first time.'" *NLRB* v. *Seven-Up Bottling Co.*, 344 U. S. 345, 350 (1952).

In any event the unilateral decreases in the meter rate had a substantial effect on the commission earnings of the drivers. The fare rate can not be compared to the sale price of a product since the latter is subject to day by day fluctuations resulting from supply and demand while the meter rate is relatively permanent and only changed after prior approval by the municipal regulatory agency. Meter rates are more comparable to public utility rates; prices are not under the sole control of management. It is apparent that in connection with petitioners' galaxy of unfair labor practices, that the unilateral reduction of fare rates was further evidence of a desire not to bargain in good faith. This Court has held that "Unilateral action by an employer without prior discussion with the union does amount to a refusal to negotiate about the affected conditions of employment under negotiation, and must of necessity obstruct bargaining contrary to congressional policy. *NLRB* v. *Katz*, 369 U. S. 736, 747 (1962).

3) The Board in finding that petitioners had discharged the employees ordered that they be reinstated with back pay. The District of Columbia Circuit in enforcing the Board's order agreed not only with the Board's factual determination that the employees were discharged but with the Board's remedy. The court's conclusion that "the Board's action is supported by substantial evidence" was a correct statement of its reviewing authority.

CONCLUSION.

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

SHELDON M. CHARONE,
SHERMAN CARMELL,
Attorneys for Respondent Local 782, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

CARMELL & CHARONE,
29 South LaSalle Street,
Chicago, Illinois.